JINKO SOLAR TECHNOLOGY SDN BHD v. OCEANTRAX ENGINEERING SDN BHD

HIGH COURT MALAYA, PULAU PINANG
HADHARIAH SYED ISMAIL J
[ORIGINATING SUMMONS NO: PA-2- NCC-30-09-2018]
26 DECEMBER 2018

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application for – Application to restrain petitioner from proceeding with winding up petition or advertising winding up petition of company – Whether there were substantial disputes against petitioner's claims – Whether petitioner bona fide petitioner – Whether petitioner could be restrained by injunction from advertising winding up petition – Whether law of injunction in Keet Gerald Francis's case applicable – Whether balance of convenience lay in granting injunction*

The plaintiff's application *via* encl. 3 was for an interlocutory injunction to restrain the defendant from proceeding with a winding-up petition and if the defendant had already filed a winding up petition, to restrain advertisement of winding-up petition. The plaintiff, a company in the business of conducting research and development of solar energy cells and modules, had appointed the defendant with a third party contractor to carry out construction and installation works for the plaintiff in various sites and for various projects. Subsequently, the defendant served on the plaintiff two notices respectively, issued pursuant to ss. 465(1)(e) and 466(1)(a) of the Companies Act 2016 claiming for the sum of RM5,600,926.55 and RM68,085.96, respectively. In the said notices, the defendant had made it clear of its intention to file a winding-up petition against the plaintiff if the plaintiff failed to pay the sums claimed within 21 days from date of service. The plaintiff contended that the defendant ought to be stopped from proceeding with the winding-up petition because the plaintiff had, *inter alia*, a *bona fide* and substantial dispute against the defendant's claims. The defendant, however, objected to the plaintiff's application. The issue that arose was whether this court ought to grant an interlocutory injunction to restrain the defendant from advertising a winding-up petition against the plaintiff.

Held (allowing plaintiff's application):

(1) The unchallenged evidence was that the sums claimed by the defendant was not supported by a court judgment. The defendant had not proven they were entitled to receive payment of more than RM5.6 million from the plaintiff. When the defendant refused to prove its claim by instituting an action against the plaintiff, it was obvious that the defendant had taken the easy way out by putting pressure on the plaintiff. The defendant was not a *bona fide* petitioner and thus the defendant could be restrained by an injunction from advertising the winding-up petition. (para 11)

(2) This injunction was applied by way of originating summons and the laws relied on were not winding-up rules. This originating summons was filed on 24 September 2018. The winding-up petition was filed on 25 September 2018. Accordingly, the law of injunction as expounded in the *Keet Gerald Francis's* case applied. (para 11)

(3) The plaintiff was seeking for *inter alia* a declaration that notices under s. 465(1)(e) and s. 466(1)(a) of the Companies Act 2016 be declared null and void. In order for the court to grant or not to grant the relief sought for by the plaintiff, *status quo* of the parties had to be maintained. There were serious issues to be tried and a balance of convenience lay in the granting of the injunction. (paras 11 & 12)

Case(s) referred to:

Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Europlus Corporation Sdn Bhd v. Lim Wai Leng [2003] 1 LNS 31 HC ***(refd)***

Homewest Sdn Bhd v. Vision Returns Sdn Bhd [2016] 5 CLJ 922 HC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Legislation referred to:

Companies (Winding-up) Rules 1972, r. 24

Companies Act 2016, ss. 465(1)(e), 466(1)(a)

For the plaintiff - YC Wong & Chin Chon Yen; M/s KN Lee & Assocs

For the defendant - Nicholas Tan & Khoo Mei Yin; M/s Lim Huck Aik & Co

Reported by Suhainah Wahiduddin

JUDGMENT

(encl. 3)

Hadhariah Syed Ismail J:

Introduction

[1] Enclosure 3 is the plaintiff's application for an interlocutory injunction to restrain the defendant from proceeding with a winding-up petition and if the defendant had already filed a winding-up petition, to restrain advertisement of winding-up petition. After hearing submissions from both sides, I allowed the plaintiff's application. My reasons for the decision are as follows.

Facts

[2] The plaintiff is a local company formed with capital linked to China - based enterprises whereby its penultimate holding company and ultimate holding company are based in China and Hong Kong respectively. The parent company is Jinko Solar Holding Co Ltd.

[3] The plaintiff and its related companies are in the business of conducting research and development, manufacturing and selling of solar energy cells and modules.

[4] The defendant is a co-contractor appointed by the plaintiff together with a third party co-contractor called Shanxi Weixin Construction Engineering Co Ltd from China to carry out construction and installation works for the plaintiff in various sites and for various projects during the year 2016 and 2017 pursuant to nine different construction agreements.

[5] On or about 29 August 2018 and 30 August 2018, the defendant through its solicitors M/s Lim Huck Aik & Co served on the plaintiff two notices dated 27 August 2018 and 30 August 2018 respectively, issued pursuant to s. 465(1)(e) and s. 466(1)(a) of the Companies Act 2016 claiming for the sum of RM5,600,926.55 and RM68,085.96 respectively. In the said notices, the defendant had made it clear of its intention to file a winding-up petition against the plaintiff if the plaintiff fails to pay the sums claimed within 21 days from date of service.

[6] *Vide* a letter dated 18 September 2018, the plaintiff informed the defendant that they are disputing the defendant's claim and requested the defendant to withdraw the winding-up notices. There is no response from the defendant.

[7] The plaintiff contended the defendant ought to be stopped from proceeding with the winding-up petition because:

(i) The plaintiff has a *bona fide* and substantial dispute against the defendant's claims;

(ii) The plaintiff is solvent;

(iii) The defendant's intended winding-up petition will cause irreversible damage to the plaintiff; and

(iv) There are more suitable forum for the defendant to assert its claims against the plaintiff.

[8] The defendant objected to the plaintiff's application. The argument put forth by the defendant are as follows:

(i) The court cannot grant an injunction to restrain the defendant from advertising the winding-up petition based on the case of *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391. In *Azman & Tay*'s case, Vincent Ng J held that r. 24 of the Companies (Winding-up) Rules 1972 imposed upon a petitioner a mandatory requirement to advertise and gazette the winding-up petition upon it being filed and so it debarred the court from granting an injunction sought by the respondent. Similar approach was taken in *Homewest Sdn Bhd v. Vision Returns Sdn Bhd* [2016] 5 CLJ 922 and *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248.

(ii) Injunction is not permissible outside the 21 days period. For this point, the defendant relies on the case of *Europlus Corporation Sdn Bhd v. Lim Wai Leng* [2003] 1 LNS 31; [2003] MLJU 42, wherein Abdul Malik Ishak J said:

> The company has 21 clear days to pay the debt, excluding, of course the day of service and the plaintiff has gone beyond the statutory time frame. Under the law, the company is considered a debtor. Now, as a debtor, the company has not paid the debt within 21 days of the service of the statutory notice and so the defendant as a creditor is entitled, under the law, to present a petition and the defendant cannot be restrained by injunction.

(iii) The plaintiff has failed to take the necessary steps within the 21 days statutory period. The plaintiff's remedy lies in the winding up court. After all, the plaintiff has filed its challenge in the winding up court.

The Issue

[9] Whether this court ought to grant an interlocutory injunction to restrain the defendant from advertising a winding-up petition against the plaintiff?

The Law

[10] It is trite law that in deciding whether to grant or not to grant interlocutory injunction, the court must consider the following principles:

(i) whether the facts presented before the court discloses a *bona fide* serious issues to be tried;

(ii) if the court finds there are issues fit to be tried, whether justice of the case lies in favour of granting an injunction;

(iii) injunction is a discretionary remedy intended to produce a just result and intended to maintain the *status quo*.

(refer: *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193.)

Findings

[11] After giving due consideration to the facts, the case laws and the applicable laws, these are my findings:

(i) The plaintiff, in its affidavits has contended that the defendant is not a *bona fide* petitioner because:

(a) The amount claimed by the defendant is disputed by the plaintiff. The defendant had not obtained a court judgment to support its claim.

(b) The defendant did not comply with the terms of the contract in seeking payment.

(c) The winding-up petition is intended to put pressure on the plaintiff to make payment.

Now, in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5; [1988] 2 MLJ 447, the Supreme Court said "If the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising." In *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391; [2002] 4 MLJ 390, the issue of whether the petitioner of a winding-up petition is *bona fide* or not did not arise. In the present case, the unchallenged evidence is the sums claimed by the defendant is not supported by a court judgment. In that sense, the defendant has not proven they are entitled to receive payment of more than RM5.6 million from the plaintiff. This being the case, the plaintiff has a fundamental right to demand 'prove us we owe you RM5.6 million'. To me, when the defendant refused to prove its claim by instituting an action against the plaintiff, it is obvious that the defendant took an easy way out by putting pressure on the plaintiff. In the circumstances as aforesaid, I agree with the plaintiff that the defendant is not a *bona fide* petitioner. Since the defendant has not acted *bona fide,* based on *Chip Yew Bricks*'s case, the defendant can be restrained by an injunction from advertising the winding-up petition.

(ii) I disagree with the defendant's contention that this court cannot grant injunction because plaintiff's remedy lies in the winding up court. My reason is this. This injunction is applied by way of originating summons and the laws relied on are not winding up rules. This originating summons was filed on 24 September 2018. The winding-up petition was filed on 25 September 2018. Accordingly, the law of injunction as expounded in *Keet Gerald Francis*' case applies.

(iii) *Vide* this originating summons (encl. 1), the plaintiff is seeking for *inter alia* a declaration that notices under s. 465(1)(e) and s. 466(1)(a) of the Companies Act 2016 dated 27 August 2018 and 30 August 2018 respectively be declared null and void. In order for the court to grant or not to grant the relief sought for by the plaintiff, *status quo* of the parties has to be maintained.

Decision

[12] For the reasons stated above, I am satisfied that there are serious issues to be tried and balance of convenience lies in granting the injunction. I therefore allowed the plaintiff's application in encl. 3.